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VICTIMS OF THEIR OWN RELUCTANCE: A LEGAL ANALYSIS OF THE UNITED
STATES AND THE MINE BAN TREATY

by

Ashley Flood

A Thesis Submitted in Partial Fulfillment
Of the Requirements for the
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ABSTRACT

Victims of Their Own Reluctance: A Legal Analysis of the United States and the Mine Ban Treaty

Ashley Flood

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This paper offers a legal analysis of the United States' failure to join the 1997 Mine Ban Treaty under the parameters of the Law of Armed Conflict. The Law of Armed Conflict sets forth the four basic principles that govern the actions in warfare while the Mine Ban Treaty prohibits the use, stockpiling, production and transfer of anti-personnel mines. As civilians and children are falling victim to landmines every day, the International Committee of the Red Cross pushed for an international policy change that would help the humanitarian assistance as well as place an outright ban on an entire class of weapons. As most of the world's countries have signed the Mine Ban Treaty, this paper questions the legality of the United States' failure to do so under the four basic principles of the Law of Armed Conflict. After a discussion of the applicable law pertaining to landmines and an expansion of the four principles, this paper concludes that the United States is in violation of the Law of Armed Conflicts and recommends that it sign the Mine Ban Treaty.

KEYWORDS: Landmines, Mine Ban Treaty, Ottawa Convention, Laws of Armed Conflict, Proportionality, Distinction, Military Necessity, Unnecessary Suffering

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CHAPTER ONE

Introduction

In January 2018, a vehicle in Mali ran over a landmine killing a total of twenty-four individuals, including four babies and their respective mothers.¹

On December 24, 2017, another landmine in Afghanistan detonated when a vehicle drove over it, killing seven civilians and wounding three.²

On August 9, 2016, in Yemen, eleven civilians, seven of whom were children – two under the age of four, were killed by an antivehicle mine.³

In Cambodia, a country with a significant number of landmines, fifty percent of landmine casualties are children, as reported by the Cambodian Red Cross.⁴

This number increases in Somalia where children account for more than 55 percent of the victims as stated in the 2003 Landmine Impact Survey.⁵

The alarming statistics of landmine casualties eventually led to the inception of the 1997 Mine Ban Treaty “on the prohibition of the use, stockpiling, production, and transfer of anti-personnel mines and on their destruction.”⁶ Answering a public outcry to

¹ Bamako, “‘Terrorist’ landmine kills 24 civilians officials say,” *Daily Sabah Africa*, (January 2018), <https://www.dailysabah.com/africa/2018/01/25/terrorist-landmine-kills-24-civilians-in-mali-local-officials-say>, (accessed February 2018).

² *Landmine kills 7 civilians in Afghanistan*, Egypt Today, (December 2017), <http://www.egypttoday.com/Article/1/38200/Landmine-kills-7-civilians-in-Afghanistan>, (accessed February 2018).

³ “Yemen: Houthi Landmines Claim Civilian Victims,” *Human Rights Watch*, (September 2016), <https://www.hrw.org/news/2016/09/08/yemen-houthi-landmines-claim-civilian-victims>, (accessed February 2018).

⁴ *Children and Landmines: A Deadly Legacy*, UNICEF, https://www.unicef.org/french/protection/files/Landmines_Factsheet_04_LTR_HD.pdf, (accessed February 2018).

⁵ *Children and Landmines: A Deadly Legacy*.

⁶ “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” opened for signature December 1997, International Campaign to Ban Landmines, <http://icbl.org/media/604037/treatyenglish.pdf>.

the disturbing death toll, the treaty outright bans a weapon system that has been systematically and extensively used across the globe.⁷ A conjunction of humanitarian assistance and arms control, the treaty is a combination of both international governments and nongovernmental organizations (NGOs) coming together to push for an international ban on a weapon that indiscriminately detonates, maiming thousands of civilians and children. Gaining the attention of the international community, the Mine Ban Treaty was successful in securing more than 80% of the world's countries as signing parties.⁸ Yet, as an international powerhouse, the United States (U.S.) to date has failed to sign the treaty.

A party to the world's first treaty regarding landmines – Amended Protocol II to the Convention on Certain Conventional Weapons, the U.S. claims to be at the forefront of the global outcry against the use of landmines, but continues to be a minority in the international community.⁹ The U.S. 2007 policy regarding landmines states:

“POLICY: The military capabilities provided by landmines remain necessary for the United States to protect its armed forces and ensure the success of their mission. The United States is also committed to eliminating the humanitarian risks posed by all land-mines – both anti-personnel and anti-vehicle. It stands with those who seek to protect innocent civilians from these weapons. However, the United States has not signed the Ottawa Convention [the Mine Ban Treaty] because it fails to balance legitimate military requirement with humanitarian concerns.”¹⁰

The U.S. attributes their reluctance to the treaty's failure “to balance legitimate military requirement with humanitarian concerns,”¹¹ yet their reasoning is not legitimate in the international community or even within the U.S. community itself. Several high-ranking

⁷ Kenneth Anderson, “The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society,” *EJIL* 11, no. 1 (2000), 92.

⁸ *Treaty Status*, International Campaign To Ban Landmines, (2018), <http://icbl.org/en-gb/the-treaty/treaty-status.aspx> (accessed February 2018).

⁹ “U.S. Policy Regarding Landmines,” *The American Journal of International Law* 102, no. 1 (January 2008), 190.

¹⁰ *Ibid*, 190.

¹¹ *Ibid*, 190.

U.S. military officials have repeatedly refuted the military utility of landmines making them irrelevant to the U.S. military requirements.

Based on the faulty reasoning that the U.S. stands by for its failure to join the 1997 Mine Ban Treaty, this paper is questioning the legality of the U.S. position under the Law of Armed Conflict. Is the U.S. in Violation of the Laws of Armed Conflict based upon its inherent principles by not being a state party to the 1997 Mine Ban Treaty? Yes. Considering the inherent nature of the weapon, landmines in and of themselves violate the four principles. Therefore, the U.S. is in violation of the Laws of Armed Conflict as it fails to be a signing party to the 1997 Mine Ban Treaty. While the U.S. is not a signatory party to the Mine Ban Treaty, they are also not in violation to the treaty; however, the U.S. is in violation of the Laws of Armed Conflict based upon its willingness to use landmines. Thus, the U.S. should ratify the 1997 Mine Ban Treaty because it would give them the authority and credibility in the international community, while providing a set of guidelines for the nation to follow. This paper then argues that the United States is in violation of the Laws of Armed Conflict and recommends that they should be a signing party to the 1997 Mine Ban Treaty.

Although the U.S. failed to sign the treaty, they have contributed an extensive amount of money to the humanitarian assistance efforts.¹² However, this was not until after the ICRC surgeons acted against the horrific weapon taking thousands of innocent victims around the world. According to UNICEF, “children account for one in every five landmine victims.”¹³ Each and every day more and more individuals are dying at the result of landmines around the world – one person every twenty-two minutes has fallen

¹² Ibid, 191.

¹³ *Children and Landmines: A Deadly Legacy*.

victim to a landmine globally since 1996.¹⁴ During the mid-1990's, "over 130 states stockpiled landmines and landmines killed or injured an estimated 20,000 to 30,000 people every year;"¹⁵ (see *Figure 1* for updated statistics). The International Committee of the Red Cross's (ICRC) team of surgeons witnessed the detrimental effects of landmines firsthand when tending to "mine-inflicted wounds, deaths, and trauma in Afghanistan, Angola, Cambodia, and Mozambique."¹⁶ Surgeons of the ICRC feared the alarming increase of limb amputations on landmine victims during the 1980s and in response to this, initiated an international campaign to ban landmines.¹⁷

Number of mine/ERW casualties per year (1999–2016)⁴

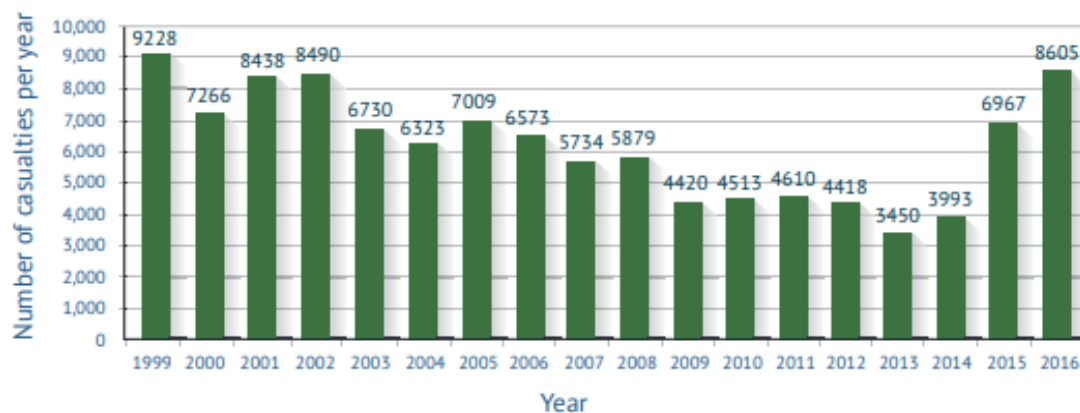


Figure 1¹⁸

¹⁴ Anne Theodore Briggs, "Proceed With Caution: U.S. Policy Toward a Global Ban on Landmines," *Human Rights Brief*, (1999), 1.

¹⁵ Rachel Good, "Yes We Should: Why the U.S. Should Change Its Policy Toward the 1997 Mine Ban Treaty," *Northwestern University Journal of International Human Rights*, (2011), 1.

¹⁶ Ramesh Thakur & William Maley, "The Ottawa Convention on Landmines: A Landmark Humanitarian Treaty in Arms Control?" *Global Governance* 5 (1999), 283.

¹⁷ Anderson, 104.

¹⁸ Figure 1: "Landmine Monitor 2017," *International Committee to Ban Landmines – Cluster Munition Coalition*, (December 2017), http://the-monitor.org/media/2615219/Landmine-Monitor-2017_final.pdf, (accessed April 2018), 52; I acknowledge that these statistics incorporate explosive remnants of war (EPW), but due to scope and limitations of my research, these numbers represent an accurate estimate of the number of victims affected by landmines. I also acknowledge that these statistics only account for the known number of casualties, i.e. those reported.

Bringing this humanitarian issue to light, the surgeons depicted the evidence in graphic photos and videos, and paired with the language of the law, the ICRC surgeons were successful in showing that “landmines were causing ‘superfluous injury and unnecessary suffering.’”¹⁹ This “occurred as the result of a co-ordinated grassroots strategy that mobilized a succession of powerful images and messages that were designed to stir and awake, alarm and outrage, inspire and mobilize the public into action.”²⁰ Gaining the attention of international NGOs, the ICRC initiated what later became known as the Ottawa Process.²¹ “By bringing the plight of the most vulnerable victims of war to the attention of the media and public opinion around the world,”²² NGOs were at the forefront of a global campaign to ban landmines.²³

In October of 1992, there was an organized meeting in New York City at the Empire State Building involving six different non-governmental organizations all with the same agenda – “to develop a strategy for achieving a worldwide ban on landmines.”²⁴ Coming from a variety of standpoints yet still concerned about the current issue, the Handicap International of France, Human Rights Watch of the U.S., Medico International of Germany, Mines Awareness Group of the United Kingdom, Physicians for Human Rights of the U.S., and Vietnam Veterans of America Foundation gathered for an initial meeting.²⁵ At the conclusion of this meeting, the International Campaign to Ban

¹⁹ Thakur & Maley, 283.

²⁰ Maxwell A. Carmen, Robert J. Lawson, & Brian W. Tomlin, *To Walk Without Fear: The Global Movement to Ban Landmines*, (Toronto: Oxford University Press, 1998), 14.

²¹ Anderson, 104; Trevor Findlay, “Verification of the Ottawa Convention: Workable Hybrid or Fatal Compromise?” *Disarmament Forum* (1999), 49.

²² Cameron, Lawson, & Tomlin, 5.

²³ Anderson, 104-105.

²⁴ Good, 1.

²⁵ Anderson, 105.

Landmines (ICBL) was born.²⁶ Although the ICRC, the mediator in this entire process, did not join the ICBL, it fully supported the cause and was merely limited by its own mandates and thus unable to join.²⁷ Over the course of the next few years, this diverse group of NGOs came together to expand the ICBL to more than 1,200 different NGOs which included more than 60 countries.²⁸ Amongst this group of NGOs, there were differing ideas about what the issue really was – some regarded this as a humanitarian law issue while others viewed it as medical issue, or even as a social issue.²⁹ Either way, these NGOs came together to initiate the Ottawa Process that eventually led to the December 1997 signing of the Mine Ban Treaty in Ottawa, Canada.³⁰

Prior to the signing of the treaty, there was a long process of negotiations and meetings that took place. “Prominent media outlets increasingly recognized the compelling story behind the global humanitarian crisis,”³¹ and as soon as countries realized the complexity of the landmine issue, sympathetic governments began to initiate individual laws and restrictions on the use and export of landmines in their respective countries.³² As the support for the ICBL continued to grow, most of the state parties were small to medium world powers,³³ that included the Nordic countries and Canada.³⁴ These small to medium powers began to see this landmine campaign “as an important counterweight to the political hegemony of the United States.”³⁵ This view of the U.S.

²⁶ Ibid, 105.

²⁷ Ibid, 105.

²⁸ Ibid, 105.

²⁹ Ibid, 105.

³⁰ Ibid, 108.

³¹ Cameron, Lawson, & Tomlin, 23.

³² Anderson, 106.

³³ Findlay, 49

³⁴ Anderson, 107.

³⁵ Ibid, 107.

may have influenced the lesser NATO power Canada to be the driving state force that the ICBL needed to initiate a political and legal process to ban landmines.³⁶ The Canadian Foreign Minister Lloyd Axworthy proclaimed:

“The need for new partnerships to address global problems and the increased power wielded by a wide range of state and non-state actors intersected in the landmines campaign . . . it brought together a mixed group of players into a coalition without precedent . . . The landmines campaign was the harbinger of the new multilateralism: new alliances among states, new partnerships with non-state actors, and new approaches to international governance.”³⁷

Therefore, in December of 1996, acknowledging a request from the Canadian Foreign Minister Lloyd Axworthy to eliminate or limit the use of landmines, the ICBL in conjunction with a “core group” of states, (Canada, Norway, Austria, South Africa, and Belgium),³⁸ began negotiations to build a treaty in 1996.³⁹ The first planning meeting, held in Ottawa, Canada, was for states that would support a complete ban of anti-personnel landmines.⁴⁰ The conference, “called ‘Towards a Global Ban on Anti-Personnel Mines,’ . . . brought representatives of over 50 countries and 24 observer states to discuss a strategy for achieving a ban.”⁴¹ This is also where Canadian Foreign Minister Axworthy “made the surprise, radical announcement that Canada would hold a treaty signing ceremony a mere year later.”⁴²

Once this announcement was made, the global community went to work. Through a “series of regional symposia and workshops”⁴³ in the international community, the ICBL and its acting NGOs were able to gain a larger group of state support that would

³⁶ Ibid, 108.

³⁷ Ibid, 109.

³⁸ Good, 1; Thakur & Maley, 284.

³⁹ Good, 1.

⁴⁰ Thakur & Maley, 284.

⁴¹ Cameron, Lawson, & Tomlin, 6.

⁴² Anderson, 108.

⁴³ Thakur & Maley, 284.

help push the global ban.⁴⁴ Through NGO pressure, governments began to see the “genuine extent of the problem and put it on their policy agendas”⁴⁵ and recognized that “the decision to ban landmines was essentially cost and risk-free.”⁴⁶ In anticipation of the treaty-signing, Austria prepared the first draft in February 1997.⁴⁷ This led to three more meetings: the first in Vienna from 12-14 February 1997 and the second in Bonn in April 1997, and finally in Brussels in June 1997.⁴⁸ Final negotiations were then conducted in Oslo, Canada in September of 1997.⁴⁹ In these final negotiations, not only were state actors able to participate, but also the ICBL and ICRC;⁵⁰ this marked the “successful entry of international non-governmental organizations into [the] diplomatic and lawmaking process.”⁵¹ This final negotiation process was where the U.S. first participated in the negotiations of the treaty and listed non-negotiable demands in order for them to be a signing party.⁵² The U.S. put forth “five treaty-weakening amendments, . . . which included 1) a geographic exception for Korea, 2) a waiver for American “mixed mine systems, 3) an optional nine-year delay period, 4) a treaty opt-out clause, and 5) a provision permitting countries to sign with reservations.”⁵³ As a complete package, the proposal was rejected, and thus the U.S. refused to sign.⁵⁴ Ultimately, the final product was a mixture of humanitarian assistance measures and an arms control measure to ban

⁴⁴ Anderson, 109.

⁴⁵ Ibid, 107

⁴⁶ Ibid, 107.

⁴⁷ Findlay, 50;

⁴⁸ Ibid, 50; Carmen, Lawson, & Tomlin, 6.

⁴⁹ Findlay, 51.

⁵⁰ Anderson, 112.

⁵¹ Ibid, 92.

⁵² Findlay, 51.

⁵³ Holly Burkhalter, “The Mine Ban Treaty,” *Foreign Policy in Focus*, (2005), http://fpif.org/the_mine_ban_treaty/, (accessed March 2018).

⁵⁴ Ibid.

the use of landmines,⁵⁵ and became one of “the most significant legal events of the entire 1990s.”⁵⁶ The finalized product was ready for signatures in December of 1997, only fourteen months after its initial planning meeting, and became to be known as the Mine Ban Treaty (MBT), the Ottawa Convention, or the Ottawa Treaty.⁵⁷ For the purpose of this paper, the treaty will be hereinafter referred to as the MBT.

This paper offers a legal analysis of the United States failure to comply with and sign the 1997 MBT, resulting in a violation of the Laws of Armed Conflict. Chapter Two will review the applicable law pertaining to the use of landmines, specifically the origin of the MBT and Protocol II to the United Nations Convention on Certain Conventional Weapons. Chapter Three will then provide a background of the four core principles to the Laws of Armed Conflict, while Chapter Four will provide a discussion applying the law to the principles. Based on this discussion, one will conclude that the U.S. is in violation of the Laws of Armed Conflict as it fails to be a signing party to the 1997 Mine Ban Treaty.

⁵⁵ Findlay, 51.

⁵⁶ Anderson, 92.

⁵⁷ Good, 1; Briggs, 1; Thakur & Maley, 273; Anderson, 92.

CHAPTER TWO

The Mine Ban Treaty

The Treaty

As the first treaty to “impose a ban on an entire class of weapons already in widespread use,”⁵⁸ the MBT is historically significant for its triumph not only in arms control, but also for its “unusual coalition of governments.”⁵⁹ The 1997 MBT, as published by the ICBL, is the “legally binding international agreement that bans the use, production, stockpiling and transfer of antipersonnel mines and places obligations on countries to clear affected areas, assist victims and destroy stockpiles.”⁶⁰ Currently with the 164 state parties, which amounts to more than 80% of the world’s countries,⁶¹ the MBT is “[d]etermined to put an end to the suffering and casualties caused by antipersonnel mines.”⁶² Each of these parties has agreed to the general obligations as defined in Article 1 of the MBT:

- “1. Each State Party undertakes never under any circumstances:
 - a) To use anti-personnel mines;
 - b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;
 - c) To assist, encourage or induce in any way, anyone to engage in any activity prohibited to a State Party under this Convention.
2. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention.”⁶³

⁵⁸ Thakur & Maley, 273.

⁵⁹ Ibid, 273.

⁶⁰ *The Treaty*, International Campaign To Ban Landmines, <http://icbl.org/en-gb/the-treaty.aspx> (accessed February 2018).

⁶¹ *Treaty Status*

⁶² “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” Preamble.

⁶³ Ibid, Article 1.

Under these obligations, the MBT defines an anti-personnel mine as “a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure, or kill one or more persons.”⁶⁴ However, under this definition, “[m]ines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.”⁶⁵ Consequently, an anti-handling device is then defined by the MBT as “a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine.”⁶⁶ The MBT outlines in its articles additional exceptions and rules that further explain and regulate the use and destruction of landmines.

As an international treaty, the MBT is limited to only state parties as signatories, and the NGOs were successful in ensuring national security measures were upheld in the writing of the MBT as to satisfy the state parties.⁶⁷ The ICBL and its partners “called for a simple, clean, and comprehensive ban on APL [anti-personnel landmines] with no exception, reservation, or loophole,”⁶⁸ and they were successful in influencing the state parties to accept the strict rules regulating the use of landmines.⁶⁹ State parties to the MBT have acknowledged the acting role of NGOs in government and “found that much its work at the country level . . . intimately involves the diverse and dedicated contributions of [NGOs].”⁷⁰ The MBT was at the forefront of NGOs moving “from being

⁶⁴ Ibid, Article 2.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Thakur & Maley, 280.

⁶⁸ Ibid, 281.

⁶⁹ Ibid, 281.

⁷⁰ Ibid, 282.

service providers and information disseminators to assuming policy-shaping roles in local, national, and international public policy.”⁷¹ Consequently the MBT will set future precedent for NGOs mediating with state parties to impact global issues and to declare an international legal change.⁷² Nonetheless, that does not mean there was not friction in the negotiations of such a historical treaty.

One area of the MBT that the outliers or non-signatories (United States, Russia, China etc.)⁷³ wanted to push further on was the verification process.⁷⁴ Their complaint was that the MBT “does not establish any verification machinery to ensure compliance with the ban on production, use, and transfer of mines.”⁷⁵ Because state parties do not necessarily rely on a good faith basis, certain states called for a strict verification process.⁷⁶ Verification methods could include a variety of approaches ranging “from on-site inspection to satellite imagery, electronic surveillance, aerial reconnaissance, and other remote technologies.”⁷⁷ Consequently, with a strict verification process, the MBT must then outline protections “against costly, politically motivated, malicious, or frivolous charges”⁷⁸ that might occur. In addition, the framers of the MBT acknowledged the widening gap between different parties in relation to the rapid technological advances.⁷⁹ The intelligence capabilities of the U.S. per se are far more advanced than that of developing countries that are a part of the MBT.⁸⁰ This gives rise to countries

⁷¹ Ibid, 282.

⁷² Ibid, 282.

⁷³ *Treaty Status*.

⁷⁴ Thakur & Maley, 282.

⁷⁵ Ibid, 290.

⁷⁶ Ibid, 290.

⁷⁷ Ibid, 290.

⁷⁸ Ibid, 290.

⁷⁹ Ibid, 287 & 291.

⁸⁰ Ibid, 291.

having suspicion of the U.S.; “there is a qualitative discrepancy between the ability of developing countries and that of the United States to detect possible violations of arms control agreements that can trigger international inspection.”⁸¹ Arms control means are negotiated between the involved governments and therefore verification problems and political discrepancies became an inherent difficulty in the writing of the MBT.⁸² Yet, the MBT was able to establish a new standard for verification.⁸³ Unpopular with the outliers, the MBT utilizes a moral compass as a way to regulate its parameters. The MBT, in Articles 7 and 8, calls for each state party to produce evidence of compliance.⁸⁴ Thus, without a moral conscience, “no government, insurgent, or terrorist”⁸⁵ will be able to stray from the legal obligations set forth in the MBT. Therefore, “instead of relying on verification . . . the [MBT] relies on the continued stigmatization”⁸⁶ of landmines. Because of this distinct verification process, the MBT ultimately relies on the NGOs to continue to lead the campaign to ban landmines as “they must stay at the forefront of ‘keeping the bastards honest.’”⁸⁷ Because of reasons like this, the MBT continues to separate itself from any arms control or humanitarian assistance treaty in the past.

Although the verification process was not as strict as some would have liked it to be, the MBT outlines strict supplemental provisions framed within its articles. In the negotiation process, parties pushed for provisions; for example, the U.S. pushed for several provisions that would significantly weaken the treaty rendering it ineffective.

⁸¹ Ibid, 291.

⁸² Ibid, 287 & 291.

⁸³ Ibid, 291.

⁸⁴ “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction;” Thakur & Maley, 291.

⁸⁵ Thakur & Maley, 291.

⁸⁶ Ibid, 291.

⁸⁷ Ibid, 291.

Though the MBT was not as strict in the verification process, the framers stood firm on the ground of other requirements of the MBT, which ultimately outlined strict deadlines and regulations within the articles. While the MBT was ready for signatures in December of 1997, under Article 17, the entry into force date was not to be until “the first day of the sixth month after the month in which the 40th instrument of ratification, acceptance, approval or accession has been deposited.”⁸⁸ The fortieth country to ratify the MBT was Burkina Faso in September 1998, which therefore entered the MBT into force in March 1999.⁸⁹ Upon the MBT’s entry into force, several other provisions must be completed by specific dates outlined within individual articles.⁹⁰ Within four years of the entry into force date, state parties must destroy all stockpiled anti-personnel mines,⁹¹ while all minefields must be cleared by the state parties under whose jurisdiction they lie within ten years of the entry into force date.⁹² Additionally, state parties are required to report all obligations outlined in Article 7 to the United Nations Secretary-General within 180 days of the entry into force date.⁹³ As named in Article 21, the depository of the convention, the Secretary-General of the United Nations,⁹⁴ is required to hold a review conference five years after the MBT entered into force, yet additional review conferences after the first are permissive.⁹⁵ For parties that have signed the MBT after the 40th signatory, the

⁸⁸ “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” Article 17(1).

⁸⁹ Thakur & Maley, 295.

⁹⁰ Thakur & Maley, 295-296; “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.”

⁹¹ “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” Article 4.

⁹² “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” Article 5; Thakur & Maley, 296.

⁹³ “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” Article 7; Thakur & Maley, 296.

⁹⁴ “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” Article 21.

⁹⁵ Thakur & Maley, 296.

individual entry into force date will be the respective date six months after the party's acceptance or ratification.⁹⁶ Additionally, Article 20 outlines the "Duration and withdrawal"⁹⁷ of state parties:

"2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other State Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating this withdrawal.

3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict."⁹⁸

While the above articles give very specific instructions as to the dates and directives guiding the state parties' actions, Article 3 of the MBT offers a vague interpretation for each of the state parties; this article allows for parties to have "*a number* of anti-personnel mines"⁹⁹ (emphasis added) for training purposes, but does specify a limit as the "amount of such mines shall not exceed the minimum number absolutely necessary for the above-mentioned purposes."¹⁰⁰

Even with the MBT's generally strict regulations, the MBT's has afforded several successes and challenges since its inception. Once the MBT created a framework that incorporated arms control and humanitarian assistance efforts, it has become the standard that other instruments have followed, such as the Convention on Cluster Munitions.¹⁰¹

The NGOs policing the different state parties to the MBT have only seen, (in 2016), the

⁹⁶ "Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction," Article 17.

⁹⁷ Ibid, Article 20.

⁹⁸ Ibid, Article 20.

⁹⁹ Ibid, Article 3.

¹⁰⁰ Ibid, Article 3.

¹⁰¹ *What are the current challenges and successes of the Mine Ban Treaty*, Landmine & Cluster Munition Monitor, <http://www.the-monitor.org/en-gb/the-issues/faqs/mine-ban-treaty/what-are-the-current-challenges-and-successes.aspx> (accessed March 2018).

use of antipersonnel landmines in 10 countries, all by non-state armed groups, including Ukraine, Yemen, Afghanistan, Iraq, and Syria.¹⁰² Although with a majority of states a party of the MBT, there are still a few government forces using landmines (in 2016), including Myanmar, North Korea, and Syria.¹⁰³ Yet, with the explicit procedures outlined in the articles of the MBT, “Several State Parties are still facing serious compliance issues, particularly with respect to missed stockpile destruction deadlines and repeated mine clearance deadline extensions.”¹⁰⁴

For example, the ICBL issued a “Statement on Compliance to the Sixteenth Meeting of States Parties of the Mine Ban Treaty in Vienna, Austria” in December 2017.¹⁰⁵ The statement was delivered by Steve Goose, the Executive Director of the Arms Division for the ICBL, and he sighted several compliance issues in relation to individual articles of the MBT.¹⁰⁶ Under Article 4, the destruction of stockpiled anti-personnel mines,¹⁰⁷ the deadlines were missed by Greece and Ukraine, while according to Article 3, pertaining to the exceptions of use, the ICBL fails to see why state parties are abusing this exception.¹⁰⁸ According to Goose, state parties “are keeping mines under the Article 3 exception without ever using them for any of the permitted purposes. These are in essence stockpiled mines, not mines retained for training or development.”¹⁰⁹ Further

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Steve Goose, “ICBL Statement on Compliance to the Sixteenth Meeting of States Parties of the Mine Ban Treaty in Vienna, Austria,” *Human Rights Watch* (December 2017), <https://www.hrw.org/news/2017/12/21/icbl-statement-compliance-sixteenth-meeting-states-parties-mine-ban-treaty-vienna>, (accessed March 2018).

¹⁰⁶ Ibid.

¹⁰⁷ “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” Article 4.

¹⁰⁸ Goose.

¹⁰⁹ Ibid.

citing compliance issues, Goose mentions under Article 5 “there are far too many mine clearance extension requests, and too little respect for the “as soon as possible” requirement and the ten-year deadline.”¹¹⁰ Under Article 7, the transparency measures,¹¹¹ Goose states “the compliance rate for transparency reporting continues to embarrassingly low (less than 50% for 2016).”¹¹² Yet, regardless of the compliance issues that a number of select states have with the MBT, the treaty has significantly dropped the number of instances that anti-personnel landmines have been used, with most of the known uses conducted by non-state armed groups,¹¹³ (see *Figure 2*).

Locations of antipersonnel mine use October 2016–October 2017

Use by government forces	Use by non-state armed groups	
Myanmar Syria	Afghanistan India Iraq Myanmar Nigeria	Pakistan Syria Ukraine Yemen

Note: States Parties to the Mine Ban Treaty are indicated in **bold**.

*Figure 2*¹¹⁴

The impact the MBT¹¹⁵ has had on the international community is significant. Being the first treaty to ban an entire class of weapons, the collaboration of NGO’s and government parties set the “new international norm.”¹¹⁶ Regardless of the successes and challenges the MBT has faced since its entry into force, the MBT was not the first treaty

¹¹⁰ Ibid.

¹¹¹ “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” Article 7.

¹¹² Goose.

¹¹³ Ibid.

¹¹⁴ Figure 2: “Landmine Monitor 2017,” 8.

¹¹⁵ I did not have the opportunity to use the Travaux Préparatoire to the 1997 Mine Ban Treaty in my research; in lieu of, I was able to use a variety of secondary sources that cohesively came together to form an understanding and base line for my research.

¹¹⁶ Cameron, Lawson, & Tomlin, 340.

regarding the use of landmines. The first international treaty regarding landmines was the Amended Protocol II to the Convention on Certain Conventional Weapons.¹¹⁷ Although not banning an entire class of weapons, the Protocol did set legal restrictions on the use of landmines.

CCW Protocol II

Before the Mine Ban Treaty was ever introduced, attempting to limit the use of landmines was the United Nations Convention on Certain Conventional Weapons (CCW). The CCW adopted a protocol addressing landmines: “Protocol II to the 1980 Convention as amended on 3 May 1996.”¹¹⁸ Also known as the “Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996,”¹¹⁹ this specific protocol outlines the use of mines, booby traps, other devices, and anti-personnel mines, as well as the restrictions, transfer, removal, and protection from such devices.¹²⁰ For the simplicity of this paper, this protocol will be called CCW Protocol II. This was the first attempt to place restrictions on the use of landmines, and it ultimately failed. The framers of the CCW Protocol II left gaps in its language which paved the way for landmines to be used because they were militarily necessary, thus making the protocol important in this paper’s discussion to see how the MBT does not allow for such loopholes. Commentators have called CCW Protocol II “weak” and “ineffectual”¹²¹ compared to the MBT. But first, it is important to examine how CCW

¹¹⁷ “U.S. Policy Regarding Landmines,” 190.

¹¹⁸ “Protocol on Prohibition or Restriction on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996),” open for signature May 1996, United Nations, http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.40_CCW%20P-II%20as%20amended.pdf, (accessed March 2018).

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Thakur & Maley, 283.

Protocol II defines each of these terms and the language that is used in distinguishing between the different kinds of mines as compared to the MBT. A mine is simply “a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle.”¹²² Under the MBT, a mine is defined the same as in CCW Protocol II, as is an anti-personnel mine.¹²³ Additionally, an anti-handling device is defined very similar, both the MBT and CCW Protocol II using interchangeable language in their respective definitions.¹²⁴ However, the CCW Protocol II further describes a remotely-delivered mine as “a mine not directly emplaced but delivered by artillery, missile, rocket, mortar, or similar means, or dropped from an aircraft. Mines delivered from a land-based system from less than 500 metres are not considered to be “remotely delivered” provided that they are used in accordance with Article 5¹²⁵ and other relevant Articles of this Protocol.”¹²⁶ Under the definition of other devices, CCW Protocol II includes “manually placed munitions and devices including improvised explosive devices [IED’s] designed to kill, injure or damage and which are actuated manually, by remote control or automatically after a lapse of time.”¹²⁷ Whereas, booby-traps are “any device or material which is designed, constructed or adapted to kill

¹²² “Protocol on Prohibition or Restriction on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996),” Article 2.

¹²³ Ibid, Article 2; “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” Article 2.

¹²⁴ “Protocol on Prohibition or Restriction on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996),” Article 2; “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” Article 2.

¹²⁵ “Protocol on Prohibition or Restriction on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996).”

¹²⁶ Ibid, Article 2.

¹²⁷ Ibid, Article 2.

or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.”¹²⁸

Using these definitions, under Article 3 of CCW Protocol II “[i]t is prohibited in all circumstances to use any mine, booby-trap or other device which is designed or of a nature to cause superfluous injury or unnecessary suffering.”¹²⁹ Furthermore, “[it] is prohibited to use mines, booby-traps or other devices which employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations.”¹³⁰ Article 3 further states many legal and humanitarian considerations for restricting the use of such devices and states “All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies,”¹³¹ (which includes mines, booby-traps, and other devices), and takes into account practical precautions such as humanitarian and military considerations.¹³² Note that CCW Protocol II only regulates the specific use of landmines, and does not outright bans the use of landmines altogether, rather just places tight restrictions. Yet, the article calls for all circumstances to be taken into consideration when assuming certain precautions and specifies examples of such.¹³³ However, Article 3 does not limit the considerations to only the examples it includes, such as the “possible measures to protect civilians,” and “the short- and long-term military requirements for a minefield.”¹³⁴ Thus,

¹²⁸ Ibid, Article 2.

¹²⁹ Ibid, Article 3.

¹³⁰ Ibid, Article 3.

¹³¹ Ibid, Article 3.

¹³² Ibid, Article 3.

¹³³ Ibid, Article 3.

¹³⁴ Ibid, Article 3.

this leaves an open-ended loophole in CCW Protocol II as it accounts for the military considerations, whereas the MBT does not.

For the purpose of this paper, the definition of an anti-personnel mine will adopted from the MBT - “a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.”¹³⁵ Thus the definition of anti-personnel mine does not include those equipped with an anti-handling device that are designed to be detonated by a vehicle. Anti-handling device will be defined as “a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine.”¹³⁶ For simplicity, an anti-personnel landmine will be hereinafter referred to as a landmine unless otherwise specified within the context of this paper.

¹³⁵ “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” Article 2(1).

¹³⁶ Ibid, Article 2(3).

CHAPTER THREE

Law of Armed Conflict: The Four Principles

Landmines are considered a class of weapons, and all weapon systems used in warfare are regulated under their applicable treaty law as well as under the principles of the Law of Armed Conflict (LOAC).¹³⁷ Thus, one must examine the “means and methods”¹³⁸ of the use of landmines. LOAC “addresses two interrelated areas: (1) the methods of warfare; that is tactics or how we go about fighting; and (2) the means of warfare, that is what instruments of war we use to fight.”¹³⁹ Therefore, to understand the legality of the use of landmines, one must understand both the treaty law and the rules dictated by LOAC.

LOAC “is the principal body of law governing the legitimacy of military actions,”¹⁴⁰ and “describes those international rules governing the conduct of hostilities and punishable acts therein.”¹⁴¹ LOAC is guided by four fundamental principles: military necessity, distinction, unnecessary suffering, and proportionality.¹⁴² This paper acknowledges that these four principles are significantly interrelated, and accepts that there will be consistent overlap within this chapter and for the duration of this paper. The terms of LOAC, the Laws of War, and International Humanitarian Law are often

¹³⁷ MAJ Keith E. Puls, *Law of War Handbook*, (Virginia: International & Operational Law Department, The Judge Advocate General’s Legal Center and School, 2005), 179.

¹³⁸ *Ibid*, 164.

¹³⁹ *Ibid*, 164.

¹⁴⁰ Dale Stephens, “Human Rights and Armed Conflict – The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case,” *Yale Human Rights & Development Law Journal*, (2001), 4.

¹⁴¹ Beth Van Schaack & Ronald C. Slye, *International Criminal Law and Its Enforcement: Cases and Materials* (United States: Foundation Press 3, 2015), 216.

¹⁴² Puls, 164.

interchangeable; this is also acknowledged and this paper will hereinafter refer to it as LOAC.¹⁴³

Military Necessity

The principle of military necessity relies on a legitimate military objective and can be traced back to the principles origins. Initially, the military necessity principle was referred to as the idea of all means necessary to win and derives from two different standards.¹⁴⁴ Going back to the nineteenth century, the law regulating armed conflict simply recommended that a state “could do all that was necessary to ensure its survival and achieve military victory.”¹⁴⁵ In the twentieth century, the principle of military necessity now expressed humanitarian considerations.¹⁴⁶ This broad transition was solidified by the outcome at a Nuremburg trial in which German defendants attempted to use the “military necessity” defense.¹⁴⁷ In these instances, the defense was rejected,¹⁴⁸ and traditionally has been rejected under the belief that LOAC was “crafted to include consideration of military necessity.”¹⁴⁹ In its decision, the Tribunal refocused the scope of military necessity, and it now took into consideration the legitimacy of the force being used to obtain the military objective.¹⁵⁰ This brings forward one very important component of military necessity: a legitimate military objective.

If an action is deemed militarily necessary, then the acting party must determine if the target is a legitimate military objective.¹⁵¹ Under the 1977 Protocol Additional to the

¹⁴³ Thakur & Maley, 273.

¹⁴⁴ Stephens, 9.

¹⁴⁵ Ibid, 9.

¹⁴⁶ Ibid, 9.

¹⁴⁷ Ibid, 9.

¹⁴⁸ Ibid, 9-10.

¹⁴⁹ Puls, 165.

¹⁵⁰ Stephens, 10.

¹⁵¹ Puls, 165.

Geneva Conventions, Protocol I, (herein after referred to as Geneva Protocol I) Article 52(2), “military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”¹⁵² To understand this definition, the phrase “objects by which their nature, location, purpose, or use”¹⁵³ needs to be further broken down. Objects by their nature refers to the objects in the nature used by an armed force become a military objective, such as a tank.¹⁵⁴ The location of an object refers to those objects by their location are “of special importance for military operations.”¹⁵⁵ The purpose of an object refers to the intended use of the object, while the use of said object indicates its present function.¹⁵⁶ Once identifying an legitimate object under those parameters (by their nature, location, purpose, or use), the object then must offer a military advantage for it to be a legitimate military objective. As stated in the Commentary of Geneva Protocol I, “there must be a definite military advantage for every military objective that is attacked.”¹⁵⁷ Additionally, “the military advantage which should also be concrete and direct must be weighed against the civilian losses and damage which could result from an attack.”¹⁵⁸ In other words, military necessity is the “rule which allows a soldier engaged

¹⁵² *General Protection of Civilian Objects*, International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F08A9BC78AE360B3C12563CD0051DCD4> (accessed March 2018); Puls, 165-166.

¹⁵³ *General Protection of Civilian Objects*.

¹⁵⁴ Puls, 169.

¹⁵⁵ Ibid, 169.

¹⁵⁶ Ibid, 169.

¹⁵⁷ *Commentary of 1987 General Protection of Civilian Objects*, International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/5f27276ce1bbb79dc12563cd00434969>, (accessed March 2018).

¹⁵⁸ Ibid.

in armed conflict to take life and destroy property but constrains that conduct in circumstances where no military advantage exists.”¹⁵⁹

In determining a military objective, or legitimate target, two subcategories must be further characterized: people and places. Deciding if a person is a valid military objective, there is either a status based or conduct based judgement to be made.¹⁶⁰

Through a status based determination, an individual of an armed force “may immediately be targeted without any specific conduct on his part,”¹⁶¹ because he or she is considered a lawful combatant and therefore a lawful target.¹⁶² Consequently, “attacks against non-military targets,”¹⁶³ are prohibited. Through a conduct based determination, persons can become a legitimate military objective by their hostile acts; a belligerent, although not declared to be with a hostile force, through his or her acts can still be a valid target.¹⁶⁴

Invalid military objectives that would not satisfy the military necessity principle, would include noncombatants: civilians and protected persons, such as prisoners of war, the wounded and sick, medical personnel, and relief societies.¹⁶⁵ It is important to note however that civilians can become a legitimate target through their conduct, but noncombatants are invalid military objectives “unless . . . they take direct part in hostilities.”¹⁶⁶

¹⁵⁹ Major William G. Schmidt, “The Protection of Victims of International Armed Conflicts: Protocol I Additional to the Geneva Conventions,” *The Air Force Law Review*, (1984), 195.

¹⁶⁰ Puls, 169.

¹⁶¹ Ibid, 169.

¹⁶² Ibid, 169.

¹⁶³ Timothy J Heverin, “CASE COMMENT: LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS: ENVIRONMENTAL AND HUMANITARIAN ON SELF-DEFENSE,” *Notre Dame Law Review*, (1997), 8.

¹⁶⁴ Puls, 169.

¹⁶⁵ Ibid, 170-172.

¹⁶⁶ Puls, 171. *Protection of the Civilian Population*, International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/470-750065?OpenDocument> (accessed March 2018).

In further defining places as legitimate military objectives, the distinction comes down to defended places and undefended places.¹⁶⁷ Any place that an enemy force chooses to defend automatically makes it a military objective.¹⁶⁸ Undefended places are not considered valid military objectives. To be designated as an undefended place, the site must meet several criteria:

- a. all combatants and mobile military equipment are removed;
- b. no hostile use made of fixed military installations or establishments;
- c. no acts of hostility shall be committed by the authorities or by the population; and
- d. no activities in support of military operations shall be undertaken (presence of enemy medical units, enemy sick and wounded, and enemy police forces are allowed).¹⁶⁹

Other places not identified as military objectives include the natural environment and protected areas, such as hospitals and safety zones.¹⁷⁰ Other protected property includes civilian, medical, and cultural property.¹⁷¹ However, the “destruction of enemy property unless demanded by military necessity” is prohibited.¹⁷²

Distinction

Very similar to military necessity is the principle of distinction, as it refers to distinguishing between military objectives and non-military objectives. The principle of distinction “is an expression of concern for the individual victims of the conflict.”¹⁷³ This principle is sometimes quoted as the “grandfather of all principles,”¹⁷⁴ or “the most basic and lingering principle,”¹⁷⁵ because it provides humanitarian considerations. Distinction

¹⁶⁷ Puls, 173.

¹⁶⁸ Ibid, 173.

¹⁶⁹ Ibid, 173.

¹⁷⁰ Ibid, 173.

¹⁷¹ Puls, 174-175.

¹⁷² Heverin, 8.

¹⁷³ Schmidt, 196.

¹⁷⁴ Puls, 166

¹⁷⁵ Stephens, 9.

was first put forth in the St. Petersburg Declaration, which asserts “the only legitimate object . . . during war is to weaken the military forces of the enemy.”¹⁷⁶ This solidifies the importance of distinguishing between the enemy forces and the civilian population. The basis of distinction is the idea that all “military attacks should be directed at combatants and military targets, and not civilians or civilian property.”¹⁷⁷ Thus the “parties to a conflict must direct their operations only against military objectives.”¹⁷⁸ The principle of distinction is quite simple as it purely refers to distinguishing between military objectives and non-military objectives (i.e. combatants versus civilians). For example, in Geneva Protocol I, Article 48, “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”¹⁷⁹ Thus it requires forces to have a distinct and valid target before engaging. In other words, forces cannot blindly or indiscriminately engage anyone they see without first distinguishing if a target is a valid military objective. This distinction between civilian objects and military objectives is not only depicted in LOAC, but also in an abundance of military manuals.¹⁸⁰

Civilians are protected from indiscriminate attacks,¹⁸¹ and such attacks “include those where the incidental loss of civilian life, or damage to civilian object, would be

¹⁷⁶ *Customary IHL*, International Committee of the Red Cross, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha (accessed March 2018).

¹⁷⁷ Puls, 166

¹⁷⁸ Stephens, 9.

¹⁷⁹ *Basic Rule*, International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/470-750061?OpenDocument> (accessed March 2018).

¹⁸⁰ *Rule 7. The Principle of Distinction between Civilian Objects and Military Objectives*, International Committee to the Red Cross, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter2_rule7, (accessed March 2018).

¹⁸¹ Puls, 170; *Protection of the Civilian Population*.

excessive in relation to the concrete and direct military advantage anticipated.”¹⁸² Further defined in Geneva Protocol I, Article 51(4), indiscriminate attacks are:

“(a) those which are not directed at a specific military objective;
(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.”¹⁸³

Therefore, under Geneva Protocol I, Article 51(4)(a), indiscriminate attacks are not characterized under the distinction principle because the estimated objectives do not possess a specific, or distinct, target.

Proportionality

Additionally, under Geneva Protocol 1, Article 51, indiscriminate attacks are further evaluated and the principle of proportionality is introduced in Article 51(5)(b):

“(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹⁸⁴

The key word is “excessive,” as it refers to the proportionality test. It is important to note that the principle of proportionality only pertains to military objectives that may affect civilians; “the principle is only applicable when an attack has the possibility of affecting civilians. If the target is purely military with no known civilian personnel or property in the vicinity, no proportionality analysis need be conducted.”¹⁸⁵ Yet, the principle is highly relevant when judging military objectives and the military necessity, because in

¹⁸² Puls, 170.

¹⁸³ *Protection of the Civilian Population*.

¹⁸⁴ *Protection of the Civilian Population*; Puls, 166.

¹⁸⁵ Puls, 166.

war, the proportionality principle requires that the acts of military parties must be conducted in a way that are proportional to the desired outcomes.¹⁸⁶ Simply put, “the rule of proportionality provides that ‘loss of life and damage to property must not be out of proportion to the military advantage gained.’”¹⁸⁷

When the proportionality test “is applied to the use of weapons in the field, it appears to impose an obligation on the military commander to select only those weapons available that are reasonably likely to achieve a specific military objective while limiting collateral damage to nonmilitary targets.”¹⁸⁸ The “incidental loss of civilian life”¹⁸⁹ is an accepted risk that military personnel must consider when attacking an objective, and is not a violation of LOAC.¹⁹⁰ The law recognizes this risk, but also requires “the commander to weigh the expected death, injury, and destruction against the military advantage anticipated.”¹⁹¹ Thus, the proportionality analysis comes into play when the expected death, injury, or destruction is excessive in nature to the expected military advantage.¹⁹² In weighing the outcomes, it is important to note that the analysis is not *if* any death, injury, or destruction will occur as a result of the attack, but *how excessive* the death, injury, or destruction might be.¹⁹³ Essentially, the proportionality test weighs the needs of war and humanitarian requirements,¹⁹⁴ while the outcome must always be that the military advantage achieved “outweighed the civilian casualties.”¹⁹⁵

¹⁸⁶ Heverin, 8.

¹⁸⁷ Schmidt, 196.

¹⁸⁸ Ibid, 196-197.

¹⁸⁹ *Protection of the Civilian Population*.

¹⁹⁰ Puls, 166.

¹⁹¹ Ibid, 166.

¹⁹² Ibid, 166.

¹⁹³ Ibid, 166.

¹⁹⁴ Stephens, 10.

¹⁹⁵ Ibid, 11.

The principle of proportionality clearly places an extensive burden on the judging commander to act reasonably at the time of the analysis.¹⁹⁶ For example, the Department of the Army Field Manual (FM) 27-10, para. 41 states

“Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places within the meaning of the preceding paragraph but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.”¹⁹⁷

Therefore, in the proportionality analysis, commanders are required to weigh the risks of not only the civilian loss, but also the possible harm to protected places or property against the success of the military advantage.¹⁹⁸ In order to move forward, there must be a reasonable ratio within the analysis.¹⁹⁹ The term “reasonable” becomes very relevant and important in determining if the commander did act in the appropriate context; “the question of reasonableness . . . ensures an objective standard must be met as well.”²⁰⁰ First, did the commander have a reasonable amount of information before deciding?²⁰¹ Second, based on that intelligence, did the commander ultimately act reasonably?²⁰² However, the fact that the commander did not know a crucial piece of information at the time of the decision, cannot be held against him or her if, based on the information at hand, the commander acted reasonably. For example, in Desert Storm, a bunker seen as a military objective was attacked and ultimately civilian lives were lost,²⁰³ yet based on the

¹⁹⁶ Puls, 166. Stephens, 10.

¹⁹⁷ “The Law of Land Warfare,” FM 27-10 Department of the Army Field Manual, (Department of the Army, July 1956), <http://www.aschq.army.mil/gc/files/FM27-10.pdf>, (accessed February 2018); Puls, 167.

¹⁹⁸ Stephens, 10.

¹⁹⁹ Ibid, 10.

²⁰⁰ Puls, 167.

²⁰¹ Ibid, 167.

²⁰² Ibid, 167.

²⁰³ Ibid, 167-168.

assessment of the objective, the bunker was a reasonable military target and the “incidental damage would not outweigh the military advantage gained.”²⁰⁴

Unnecessary Suffering

Directly related to proportionality and military necessity and further linked to the use of certain weaponry, is the principle of unnecessary suffering.²⁰⁵ Under the 1907 Hague Convention respecting the Laws and Customs of War on Land, Article 23(e), it is forbidden “to employ arms, projectiles, or material calculated to cause unnecessary suffering.”²⁰⁶ This principle is aimed at prohibiting both the use of weapons that by nature cause unnecessary suffering and weapons in the manner used cause unnecessary suffering.²⁰⁷ Banning weapons that inherently cause unnecessary suffering is rooted in the history of LOAC; first found in the St. Petersburg Declaration of 1868, and reiterated in the Final Protocol of 1874, the Laws of War on Land in 1880, and again solidified in Hague Convention II of 1899.²⁰⁸ The term unnecessary “refers not to the suffering actually endured by an individual, but to suffering which is beyond that essential for the achievement of the purpose for which it has been inflicted, that is to say, suffering which goes beyond the mere disabling of the victim.”²⁰⁹ In other words, the suffering that is disproportionate to the military advantage. Therefore, this directly relates back to the proportionality of the unnecessary suffering and the military necessity. Together, the weight and strength of these four fundamental principles lies “in the fact that they had

²⁰⁴ Ibid, 168.

²⁰⁵ Stephens, 10; Puls, 168

²⁰⁶ *Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land – Section II: Hostilities – Chapter 1: Means of Injuring the Enemy, Sieges, and Bombardments – Regulations: Art. 23*, International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/195-200033?OpenDocument>, (accessed March 2018); Puls, 168.

²⁰⁷ Puls, 168 & 177.

²⁰⁸ Schmidt, 199-200.

²⁰⁹ Heverin, 11.

been invoked as authority in several international agreements that banned use of specifically identified weapons.”²¹⁰

²¹⁰ Schmidt, 203.

CHAPTER FOUR

Discussion: Applying the Law to the Principles

The principles of LOAC were imbedded in CCW Protocol II, Article 3 as it included “prohibitions against directing weapons against civilian populations, indiscriminate use of weapons, and disproportionate harm to civilians.”²¹¹ Yet, as CCW Protocol II directly relates its attempt at arms control to the principles of LOAC, CCW Protocol II is “a combination of exceptions, limitations, loop-holes, and admonitory . . . clauses render[ing] this treaty ineffective.”²¹² CCW Protocol II “defers to military interests and neglects the concern against harm to civilians.”²¹³ For example, the restrictions on landmines in CCW Protocol II are undermined by several of the articles, which ultimately make the protocol inadequate in arms control.²¹⁴ For instance, Articles 4 and 5 restrict the use of landmines but ultimately provide ways around the restrictions and therefore this exclusion “is virtually consumed by these exceptions.”²¹⁵ Under Article 6, the use of remotely-delivered mines is further mandated, but still very loosely, which allows for parties to navigate around the restrictions.²¹⁶ The article requires warning to civilians in certain situations, but gives way to the obligatory warning requirements if the circumstances simply do not permit.²¹⁷ Ultimately, one of the largest restrictions of CCW Protocol II is that it only applies to conflicts of international character.²¹⁸

²¹¹ Norman B. Smith, “A Plea for the Total Ban of Land Mines by International Treaty,” *Loyola of Los Angeles International and Comparative Law Review* 17, no. 507, (April 1995), 526.

²¹² Smith, 525.

²¹³ Ibid, 527.

²¹⁴ Ibid, 526.

²¹⁵ Ibid, 526.

²¹⁶ “Protocol on Prohibition or Restriction on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996),” Article 6.

²¹⁷ Ibid, Article 6; Smith, 527.

²¹⁸ Ibid, 529.

However, under LOAC Chapter 29, Rule 81, the use of landmines is restricted and specifically states “When landmines are used, particular care must be taken to minimize their indiscriminate effects.”²¹⁹ This rule applies to all international and non-international armed conflicts, and applies to anti-personnel landmines.²²⁰ But, as seen in CCW Protocol II, it overwhelmingly “defers to military interests and neglects the concern against harm to civilians,”²²¹ which in turn negates the LOAC intent to limit indiscriminate damage. Regardless of the loopholes in CCW Protocol II allowing military necessity to override the restrictions on landmines, the U.S. still held reservations. As a result of CCW Protocol II’s lack of impact on the global community’s use of landmines, the MBT derives as a measure to ensure that state parties will adhere to the fundamental principles of LOAC.²²² CCW Protocol II had little effect on the international humanitarian crisis as a result of landmines, and in response to the international outcry of the unnecessary suffering, the MBT entered into effect to close the gaps of CCW Protocol II. The MBT places a significant importance on humanitarian considerations because “such casualties conflict with well-established doctrines” of LOAC.²²³

Landmines cause unnecessary suffering. The purpose of a landmine is inherently to kill or wound an individual, and consequently landmines “pose such a threat to non-combatants that these weapons may violate principles” of LOAC.²²⁴ Landmines “can cause unintended, yet extremely injurious, effects on non-combatants”²²⁵ and a victim of

²¹⁹ *Rule 81. Restrictions on the Use of Landmines*, International Committee of the Red Cross, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter29_rule81, (accessed March 2018).

²²⁰ *Ibid.*

²²¹ Smith, 527.

²²² *Ibid.*, 534.

²²³ *Ibid.*, 508.

²²⁴ *Ibid.*, 513.

²²⁵ *Ibid.*, 533.

a landmine explosion endures unspeakable pain as the “explosions from land mines sever limbs, produce paralysis, cause blindness, and sometimes drive their victims into irreversible psychosis.”²²⁶ Upon coming into contact with a landmine, depending on the proximity, there are three common outcomes for the individual.²²⁷ The first: “Traumatic or surgical amputation of one or both lower limbs usually occurs from standing on a buried mine which detonates.”²²⁸ Second, mines set off nearby may cause “random, penetrating injuries, often including injuries to the head, neck, chest, and abdomen, and injuries that may also require surgical amputation of limbs.”²²⁹ And lastly, from handling mines, injuries to the face and arms are common.²³⁰ More importantly, “Blindness and other eye injuries will often result from all three of these experiences.”²³¹ Obviously landmines “produce fatal injuries, and the resulting death may be torturous and prolonged,”²³² and therefore the prevailing outcome of landmines can be characterized as unnecessary suffering under the terms of LOAC. As set in precedent, “Inflicting unnecessary suffering upon persons has long been recognized as a breach” of the LOAC.²³³

To override the principle of unnecessary suffering, some rely on the principles of military necessity and proportionality to advocate for the use of landmines.²³⁴ However, use of landmines is not militarily necessary in today’s warfare, nor does the weapon offer a military advantage. The intent of war is to weaken the other armed force, but “only such

²²⁶ Ibid, 515.

²²⁷ Ibid, 510.

²²⁸ Ibid, 511.

²²⁹ Ibid, 511.

²³⁰ Ibid, 511.

²³¹ Ibid, 511.

²³² Ibid, 515.

²³³ Ibid, 513. This source references several instances.

²³⁴ Ibid, 516.

destruction [is authorized] as is necessary, relevant, and proportionate to the prompt realization of legitimate belligerent objectives.”²³⁵ First on military necessity, landmines have been historically referred to for their use “as tactical defensive weapons with the primary purpose of channeling enemy forces into more easily-defended areas, denying to the enemy positions that could not be covered by friendly troops, and protecting friendly troops.”²³⁶ However, it has been repeatedly cited by high ranking military officials that the use of landmines does not help further the military objective, therefore making landmines unnecessary and irrelevant to the military objective.²³⁷ In 1993, a “former Marine Corps Commandant, General Alfred Gray, Jr., stated that he knew of no situation in Korea, Vietnam, Panama, or the Gulf War where mine warfare effectively channeled the enemy and brought them into a destructible pattern,”²³⁸ thus rendering landmines useless. Landmines are also a very difficult weapon to employ responsibly in a combat situation, where they would ideally be most useful.²³⁹ A former U.S. Secretary cited instances where “land mines killed one-fifth to one-third of all American soldiers in Vietnam, while relatively few enemy troops were killed or disabled by these weapons.”²⁴⁰ Furthermore, General Gray admitted that “he was not aware of any operational advantage from widespread deployment of mines and cited many examples where American soldiers were trapped in their own mine fields.”²⁴¹ A U.S. Army report, also cited mines as “the biggest single cause of friendly-fire deaths during mock battles . . . against a less

²³⁵ Ibid, 516.

²³⁶ Ibid, 530.

²³⁷ Ibid, 517.

²³⁸ Ibid, 517.

²³⁹ Thakur & Maley, 289.

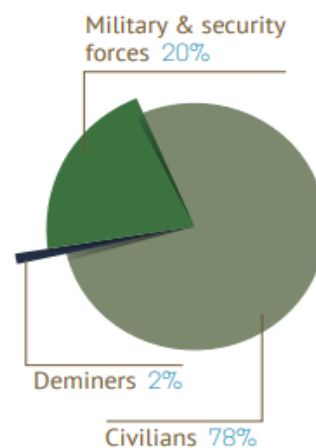
²⁴⁰ Smith, 517.

²⁴¹ Ibid, 517.

sophisticated enemy . . . forty-five were victims of their own mines.”²⁴² The U.S. Commander in South Korea, Lieutenant General James Hollingsworth called landmines “a nuisance”²⁴³ and said they were essentially ineffective and did not play a role in an active war.²⁴⁴ Clearly, there is no strong military advantage in the use of landmines.

The military advantage gained from the use of landmines is not proportionate to the amount of unnecessary suffering caused. Under the principle of proportionality, the unnecessary suffering must not be excessive in proportion to the military advantage gained.²⁴⁵ “The military utility of mines must be measured not merely in terms of their effect on the balance of military strength, but also on their capacity to inflict grief and pain on soldiers and civilians alike.”²⁴⁶ As seen above, the lack of military advantage does not outweigh the predicted unnecessary suffering inflicted on the victims. The use of landmines conflicts “with the foregoing requirements to minimize harm to civilians from military operations.”²⁴⁷ For example, as previously discussed, landmines “kill many more civilians than soldiers, often long after conflicts have ended.”²⁴⁸ (See *Figure 3*).

Mine/ERW casualties by civilian/military status in 2016



Note: This includes only the casualties for which the civilian/military status was known; for 3,576 casualties the civilian status was not recorded.

*Figure 3*²⁴⁹

²⁴² Thakur & Maley, 289.

²⁴³ Ibid, 289.

²⁴⁴ Ibid, 289.

²⁴⁵ Puls, 166.

²⁴⁶ Carmen, Lawson, & Tomlin, 4.

²⁴⁷ Puls, 520.

²⁴⁸ Thakur & Maley, 278.

²⁴⁹ Figure 3: “Landmine Monitor 2017,” 56. I acknowledge that these statistics incorporate explosive remnants of war (EPW), but due to scope and limitations of my research, these numbers represent an

Furthermore, landmines are “one of the most significant dangers to the deployment of peacekeeping missions: 42 peacekeepers (civilians) were killed and 315 injured by landmines during the UN peacekeeping operation in former Yugoslavia.”²⁵⁰ This is evidence that the use of landmines is conflicting with the requirement to minimize harm to the civilian population when, as noted above, the military advantage and military necessity to use landmines was not very compelling in the first place. Consequently, after analyzing the use of landmines, one can conclude that the use “is inconsistent with the goals of minimizing harm to civilians”²⁵¹ when weighed against the military necessity and therefore does not satisfy the principle of proportionality.

Based upon the discussion of the military necessity and proportionality above, one can see that land mines act randomly and thus have no discriminating factor. Landmines fail the test of distinction. As military commanders have noted, the use of landmines have proved to be insufficient, combat ineffective, and simply more trouble than they are worth as they have killed more American troops than they have the enemy.²⁵² The staggering amount of civilians affected by the deployment of landmines is evidence that the weapon does not have any discriminatory capabilities, as they “are among the real weapons of mass and indiscriminate destruction.”²⁵³ A landmine, by nature, “cannot tell if it is being triggered by an enemy combatant or a member of the civilian population.”²⁵⁴ Landmines are also often delivered by aircraft or artillery, which inherently gives forces

accurate estimate of the number of victims affected by landmines. I also acknowledge that these statistics only account for the known number of casualties, i.e. those reported.

²⁵⁰ Ibid, 278.

²⁵¹ Smith, 520.

²⁵² Ibid, 517.

²⁵³ Thakur & Maley, 278.

²⁵⁴ Puls, 179.

less control over the placement of landmines as they are not placed by hand.²⁵⁵

Consequently, this does not allow for the mine locations to be accurately identified or recorded.²⁵⁶ Commentators have noted that “the prohibition of weapons and tactics that cause indiscriminate harm between combatants and non-combatants is a ‘core rule’ derived”²⁵⁷ from LOAC. Congress has also “found that land mines ‘have been used indiscriminately in dramatically increasing numbers’ and that ‘[n]oncombatant civilians, including tens of thousands of children, have been the primary victims.’”²⁵⁸ The inability to distinguish between combatants and non-combatants, and their inaccurate placement “establishes the indiscriminate nature of land mine deployment,”²⁵⁹ and therefore does not satisfy the principle of distinction.

As seen above, the overwhelming number of civilian victims causes the use of landmines to “fail the double test of discrimination between combatants and civilians and [the] balance between military necessity and proportionality.”²⁶⁰ The same overwhelming statistics were the driving force behind the inception of the MBT. Falling under LOAC, the MBT was the legal strength that the international community needed to fill in the legal gaps of CCW Protocol II; the MBT banned the use of a fundamentally illegal weapon. In initiating the process, “The alliance of the professional authority of ICRC surgeons and senior military experts was very effective in compelling governments to weigh military necessity against humanitarian consequences in a manner and to an extent

²⁵⁵ Smith, 521.

²⁵⁶ Ibid, 521.

²⁵⁷ Ibid, 521.

²⁵⁸ Ibid, 533.

²⁵⁹ Ibid, 521.

²⁶⁰ Thakur & Maley, 278.

without precedent.”²⁶¹ Yet, apart from the majority of its alliances, the U.S. failed to become a signing party to the MBT.

Specifically pertaining to the U.S.’s failure to sign the MBT, one can speculate that particular Articles might have influenced the decision. For example, Article 3 of the MBT outlines the exception of using landmines for “the retention or transfer of a number of anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques,”²⁶² and Article 4 outlines the deadline for a party to destroy all anti-personnel mines, which must be no later than four years after the party’s entry into the MBT.²⁶³ The U.S., in 2014, still held 3 million landmines in reserve in case of a conflict between North and South Korea, even though General Hollingsworth questions the military utility of landmines in such an instance.²⁶⁴ Notably, the U.S. continues to maintain its stockpile even though “[t]he Pentagon has not used land mines broadly since the first Gulf War in 1991, and stopped producing them in 1997.”²⁶⁵ But perhaps the most detrimental or most plausible language within the MBT as to why the U.S. has not become a signing party is the language of Article 20 (cited in section II), which outlines the withdrawal guidelines. The Article requires any state party, if engaged in a war within six months of the party’s withdrawal, to be bound by the legal limits outlined within the MBT.²⁶⁶ This language legally binds the U.S. to the MBT if they wanted to withdraw in anticipation of a Korean conflict, that is, if the U.S. did not meet

²⁶¹ Ibid, 284.

²⁶² “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” Article 3.

²⁶³ Ibid, Article 4.

²⁶⁴ Goose.

²⁶⁵ Ibid.

²⁶⁶ “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” Article 20.

the six-month requirement; this reluctance to sign is flawed, however, as the military necessity of such a weapon has been deemed irrelevant to that particular conflict.²⁶⁷

The U.S. has repeatedly cited that the military necessity of the use of landmines in Korea as one of their predominant reasons for not joining the MBT.²⁶⁸ But General Hollingsworth continually disputes the military utility of landmines in such a conflict.²⁶⁹ Yet, the Pentagon stands by its decision to not join the MBT as the U.S. “must maintain the option to disperse antipersonnel landmines if North Korean troops advance on the South.”²⁷⁰ They argue that landmines are needed to channel the enemy,²⁷¹ yet as argued above, this is not practical or effective. The argument for the use of landmines in Korea is further flawed because the Pentagon bases this of “computer-stimulated war-games.”²⁷² In committing themselves to not deploy landmines outside of Korea after 2003,²⁷³ the U.S. simultaneously then admits to the international world that they agree with the MBT, except for their own personal and advantageous use; “the U.S. signals to every other country that the weapon’s military utility outweighs its humanitarian costs.”²⁷⁴ Other countries (i.e. Finland in regard to Russia) have come to terms with the fact that landmines “were either not essential to their [defense] or that the [defense] risks were outweighed by the humanitarian benefits.”²⁷⁵ Further diminishing the U.S.’s firm standpoint, is the fact that “a North Korean regime crazy and determined enough to

²⁶⁷ Alex Emmons, “While Stockpiling Banned Land Mines, U.S. Boasts About its Record of Clearing Them,” *The Intercept*, (2016), <https://theintercept.com/2016/04/06/while-stockpiling-banned-landmines-u-s-boasts-about-its-record-of-clearing-them/>, (accessed March 2018).

²⁶⁸ Burkhalter.

²⁶⁹ Emmons; Burkhalter.

²⁷⁰ Burkhalter.

²⁷¹ Ibid.

²⁷² Thakur & Maley, 290.

²⁷³ Ibid, 286.

²⁷⁴ Burkhalter.

²⁷⁵ Findlay, 50.

invade the South could simply come through the minefields and accept a level of casualties.”²⁷⁶ The U.S.’s argument of military necessity is extremely defective from variety of angles that do not justify for the country’s failure to become a signatory party. Most importantly, “The few hours’ worth of delay [that the landmines would potentially have in a Korean conflict] is too high a price for the savagery and destruction being caused by landmines among civilians on a daily basis.”²⁷⁷

²⁷⁶ Thakur & Maley, 290.

²⁷⁷ Ibid, 290.

CHAPTER FIVE

Conclusion

Prior to the MBT, the Department of Defense released a report stating, “the U.S. military is committed to “achieving a global ban as soon as possible” and that the Department of Defense was engaged in an “aggressive . . . program to provide effective [anti-personnel landmine] alternatives.””²⁷⁸ On the forefront of the political campaign to ban landmines in the U.S. was Senator Patrick Leahy as he “sponsored an amendment prohibiting the U.S. exports of anti-personnel landmines, which became permanent U.S. policy in 1997.”²⁷⁹ Around the same time, President Bill Clinton declared that the U.S. “would ‘lead a global effort to eliminate [anti-personnel landmines] and to stop the enormous loss of human life.’”²⁸⁰ Yet, the U.S. failed to even sign the treaty. During the drafting of the MBT, the White House released a statement holding the U.S. accountable – “by 2003 we will no longer use anti-personnel landmines outside Korea, and, within Korea, our objective is to have alternatives to anti-personnel landmines ready by 2006.”²⁸¹ The U.S. followed through on their first statement, yet has done nothing to date to even show an attempt to finding alternatives.²⁸² Within the first two years of the statement, the follow on efforts in search of alternatives produced technologies that did not even comply with the MBT.²⁸³ In 2004, President George W. Bush put into effect a new public policy that was inconsistent with the MBT.²⁸⁴ Under the new policy, the U.S.

²⁷⁸ Briggs, 2.

²⁷⁹ Ibid, 1.

²⁸⁰ Ibid, 1.

²⁸¹ Ibid, 2.

²⁸² Burkhalter.

²⁸³ Burkhalter.

²⁸⁴ Good, 2.

will cease using persistent landmines, but will “continue to use mines with self-destruct or deactivate mechanisms.”²⁸⁵ These technologies are engineered to make the landmines short-lived but do not prevent the weapon from maiming innocent victims.²⁸⁶ In fact, the technology is not 100 percent reliable and has been proven to be more costly to the demining efforts; civilians still “face the danger not only of accidentally detonating mines that have failed to self-destruct, but of coming upon hundreds of those mines randomly self-destructing at unknown times.”²⁸⁷ Therefore these additional technologies do nothing to combat the indiscriminate nature of landmines that continue to cause the unnecessary suffering of thousands of victims.

The U.S. attempted to implement a landmine that “can be command-detonated once the target has been identified as a combatant. However, the device could include a ‘battlefield override’ feature.”²⁸⁸ This feature took the human determination out of the scenario and allows the landmine to “automatically detonate the minefield if the command center is overrun by enemy soldiers,”²⁸⁹ or other individuals. Therefore, the feature makes the new “system indiscriminate and thus illegal under the treaty.”²⁹⁰ When President Barack Obama came into office in 2009, he kept this policy in place.²⁹¹ Regardless of the lack of action the executive branch, Senator Leahy held U.S. to its promise and campaigned for amendments that would fund the research to find alternatives as well as help the humanitarian effort.²⁹² To date, “the United States has

²⁸⁵ Good, 2.

²⁸⁶ “Landmine Use in Afghanistan,” *Human Rights Watch Backgrounder*, (October 2001), <http://pantheon.hrw.org/legacy/backgrounder/arms/landmines-bck1011.pdf>, 5.

²⁸⁷ *Ibid.*, 5.

²⁸⁸ Burkhalter.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ Briggs, 2.

²⁹² Good, 1.

contributed over \$1.3 billion since 1993 to clear mines and aid victims of landmines.”²⁹³

But regardless of the financial efforts put forth by a government not in compliance with the MBT, the U.S. simply undermines their “political commitment to ending their use,”²⁹⁴ and displays a lack of leadership within the international community.²⁹⁵ Merely “[t]hrowing money at the problem is not enough;”²⁹⁶ the U.S.’s own failure to sign the MBT categorizes itself as a “rogue state”²⁹⁷ not in compliance with LOAC.

The U.S. continually cites the need for the landmines in a potential Korean conflict as well as the change in the definition of an anti-personnel landmine to include the U.S.’s mixed systems.²⁹⁸ These exceptions would ultimately make the MBT as ineffective as CCW Protocol II in restricting and/or banning the use of landmines because the changes the U.S. wanted “would have created a loophole big enough ‘to drive a tank through.’”²⁹⁹ The negotiators of the MBT were right to hold their ground as “[a]ntipersonnel landmines are not a weapon to be regulated and tolerated but one to be anathematized and renounced.”³⁰⁰ The MBT is not a source of regulations, but rather a rejection of a “particular weapon – indiscriminate, and a source of unnecessary suffering and superfluous injury.”³⁰¹ If the military advantage “is less than the casualties inflicted on innocent civilians that can reasonably be predicted in advance,”³⁰² the use of such

²⁹³ Lt. General Robert G. Gard Jr., “Past Time to Join the Landmine Treaty,” *Huffington Post*, (2018), https://www.huffingtonpost.com/lt-general-robert-g-gard-jr-/past-time-to-join-the-lan_b_176335.html, (accessed March 2018).

²⁹⁴ *Ibid.*

²⁹⁵ Lesley Wexler, “The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty,” *Arizona Journal of International and Comparative Law*, (2003), 6.

²⁹⁶ Emmons.

²⁹⁷ Anderson, 96.

²⁹⁸ Thakur & Maley, 289.

²⁹⁹ *Ibid.*, 289.

³⁰⁰ *Ibid.*, 295.

³⁰¹ *Ibid.*, 294.

³⁰² *Ibid.*, 296.

weapon is prohibited under the core principles of LOAC. A landmine “is not a weapon that respects a cease-fire and it is indifferent to the distinction between civilians and soldiers;”³⁰³ it is a weapon “designed to inflict particularly horrific injuries on their victims.”³⁰⁴ Landmines are “the weapon of mass murder in slow motion,”³⁰⁵ as they have killed more people than nuclear or chemical weapons have killed combined.³⁰⁶ Based upon the compelling evidence that anti-personnel landmines violate the four core principles, the use of such weapon is in violation of the Laws of Armed Conflict. The 1997 Mine Ban Treaty prohibiting the use, stockpiling, production and transfer of an inherently illegal weapon signifies the majority of the international community’s commitment to not use landmines. The United States’ reluctance to sign the treaty discredits the country’s authority and credibility, as they are considered a rogue state.

The U.S. displayed a blatant disregard for LOAC³⁰⁷ when it decided not to sign the MBT. “Generally, a weapon was banned as inconsistent with one or more of the following: (1) its use was calculated to cause unnecessary suffering; (2) it was indiscriminate, i.e. it affected combatants and civilians alike; (3) it was deemed to be treacherous.”³⁰⁸ Landmines are inconsistent with all three of the criteria “because 80 to 90 percent of the victims are civilian; because injuries inflicted by landmines are of a horrific nature; and because landmines continue to cause death and injury for decades after being sown.”³⁰⁹ Landmines automatically fail the test of distinction and unnecessary

³⁰³ Carmen, Lawson, & Tomlin, 2.

³⁰⁴ Ibid, 2.

³⁰⁵ Thakur & Maley, 278.

³⁰⁶ Carmen, Lawson, & Tomlin, 13.

³⁰⁷ Wexler, 6.

³⁰⁸ Schmidt, 198.

³⁰⁹ Thakur & Maley, 278.

suffering, while the military necessity of landmines is “highly questionable.”³¹⁰

Landmines may have impacted minor scuffles, but have never affected “the course of a battle, let alone a war;”³¹¹ thus landmines fail the test of military necessity and the test of proportionality – the utility of the weapon does not outweigh the obvious unnecessary suffering. The “prohibition and elimination [of landmines] should be pursued as a matter of utmost urgency by governments and the entire international community,”³¹² to ban an entire class of weapons that violate the four principles of LOAC. The MBT is “[d]etermined to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless [defenseless] civilians and especially children.”³¹³ With an outright refusal to sign the 1997 Mine Ban Treaty, the United States believes it does not have to play by the rules. As a failure to the greater international community by not becoming a signatory party, the United States should sign the 1997 Mine Ban Treaty as it bans an inherently illegal weapon under the Laws of Armed Conflict. The United States’ is in violation of the Laws of Armed Conflict by its willingness to use landmines. Without its signature, the United States continues to be a victim of their own reluctance.

³¹⁰ Ibid, 279.

³¹¹ Ibid, 279.

³¹² Ibid, 279.

³¹³ “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” Preamble.

WORKS CITED

Anderson, Kenneth, “The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society,” *EJIL* 11, no. 1 (2000), 91-121.

Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land – Section II: Hostilities – Chapter 1: Means of Injuring the Enemy, Sieges, and Bombardments – Regulations: Art. 23. International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/195-200033?OpenDocument>, (accessed March 2018).

Bamako, “‘Terrorist’ landmine kills 24 civilians officials say,” *Daily Sabah Africa*, (January 2018), <https://www.dailysabah.com/africa/2018/01/25/terrorist-landmine-kills-24-civilians-in-mali-local-officials-say>, (accessed February 2018).

Basic Rule, International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/470-750061?OpenDocument> (accessed March 2018).

Briggs, Anne Theodore, “Proceed With Caution: U.S. Policy Toward a Global Ban on Landmines,” *Human Rights Brief*, (1999), 1-2.

Burkhalter, Holly, “The Mine Ban Treaty,” *Foreign Policy in Focus*, (2005), http://fpif.org/the_mine_ban_treaty/, (accessed March 2018).

Carmen, Maxwell A., Robert J. Lawson, & Brian W. Tomlin, *To Walk Without Fear: The Global Movement to Ban Landmines*, (Toronto: Oxford University Press, 1998).

Children and Landmines: A Deadly Legacy, UNICEF, https://www.unicef.org/french/protection/files/Landmines_Factsheet_04_LTR_HD.pdf, (accessed February 2018).

Commentary of 1987 General Protection of Civilian Objects, International Committee of the Red Cross, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/5f27276ce1bbb79dc12563cd00434969)

12563fb0066f226/5f27276ce1bbb79dc12563cd00434969, (accessed March 2018).

“Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction,” opened for signature December 1997, International Campaign to Ban Landmines, <http://icbl.org/media/604037/treatyenglish.pdf>.

Customary IHL, International Committee of the Red Cross, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha (accessed March 2018).

Emmons, Alex, “While Stockpiling Banned Land Mines, U.S. Boasts About its Record of Clearing Them,” *The Intercept*, (2016), <https://theintercept.com/2016/04/06/while-stockpiling-banned-landmines-u-s-boasts-about-its-record-of-clearing-them/>, (accessed March 2018).

Findlay, Trevor, “Verification of the Ottawa Convention: Workable Hybrid or Fatal Compromise?” *Disarmament Forum* (1999), 46-55.

Gard Jr., Lt. General Robert G., “Past Time to Join the Landmine Treaty,” *Huffington Post*, (2018), https://www.huffingtonpost.com/lt-general-robert-g-gard-jr-/past-time-to-join-the-landmine-treaty_b_176335.html, (accessed March 2018).

General Protection of Civilian Objects, International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F08A9BC78AE360B3C12563CD0051DCD4> (accessed March 2018).

Good, Rachel, “Yes We Should: Why the U.S. Should Change Its Policy Toward the 1997 Mine Ban Treaty,” *Northwestern University Journal of International Human Rights*, (2011), 1-37.

Goose, Steve, “ICBL Statement on Compliance to the Sixteenth Meeting of States Parties of the Mine Ban Treaty in Vienna, Austria,” *Human Rights Watch* (December 2017), <https://www.hrw.org/news/2017/12/21/icbl-statement-compliance-sixteenth-meeting-states-parties-mine-ban-treaty-vienna>, (accessed March 2018).

Heverin, Timothy J., “CASE COMMENT: LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS: ENVIRONMENTAL AND HUMANITARIAN ON SELF-DEFENSE,” *Notre Dame Law Review*, (1997), 1-30.

Landmine kills 7 civilians in Afghanistan, Egypt Today, (December 2017), <http://www.egypttoday.com/Article/1/38200/Landmine-kills-7-civilians-in-Afghanistan>, (accessed February 2018).

“Landmine Monitor 2017,” *International Committee to Ban Landmines – Custer Munition Coalition*, (December 2017): 1-106, http://the-monitor.org/media/2615219/Landmine-Monitor-2017_final.pdf, (accessed April 2018).

“Landmine Use in Afghanistan,” *Human Rights Watch Backgrounder*, (October 2001): 1-7, <http://pantheon.hrw.org/legacy/backgrounder/arms/landmines-bck1011.pdf>, (accessed April 2018).

Protection of the Civilian Population, International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/470-750065?OpenDocument> (accessed March 2018).

“Protocol on Prohibition or Restriction on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996),” open for signature May 1996, United Nations,

http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.40_CCW%20P-II%20as%20amended.pdf, (accessed March 2018).

Puls, MAJ Keith E., *Law of War Handbook*, (Virginia: International & Operational Law Department, The Judge Advocate General’s Legal Center and School, 2005): 163-194.

Rule 7. The Principle of Distinction between Civilian Objects and Military Objectives, International Committee to the Red Cross, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter2_rule7, (accessed March 2018).

Rule 81. Restrictions on the Use of Landmines, International Committee of the Red Cross, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter29_rule81, (accessed March 2018).

Schaack, Beth Van, & Ronald C. Slye, *International Criminal Law and Its Enforcement: Cases and Materials*, (United States: Foundation Press 3, 2015).

Schmidt, Major William G., “The Protection of Victims of International Armed Conflicts: Protocol I Additional to the Geneva Conventions,” *The Air Force Law Review*, (1984): 189-245.

Smith, Norman B., “A Plea for the Total Ban of Land Mines by International Treaty,” *Loyola of Los Angeles International and Comparative Law Review* 17, no. 507, (April 1995): 507-534.

Stephens, Dale, “Human Rights and Armed Conflict – The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case,” *Yale Human Rights & Development Law Journal*, (2001).

Thakur, Ramesh & William Maley, “The Ottawa Convention on Landmines: A Landmark Humanitarian Treaty in Arms Control?” *Global Governance* 5 (1999): 273-302.

“The Law of Land Warfare,” FM 27-10 Department of the Army Field Manual, (Department of the Army, July 1956), <http://www.aschq.army.mil/gc/files/FM27-10.pdf>, (accessed February 2018).

The Treaty, International Campaign To Ban Landmines, <http://icbl.org/en-gb/the-treaty.aspx> (accessed February 2018).

Treaty Status, International Campaign To Ban Landmines, <http://icbl.org/en-gb/the-treaty/treaty-status.aspx> (accessed February 2018).

“U.S. Policy Regarding Landmines,” *The American Journal of International Law* 102, no. 1 (January 2008): 190-191.

Wexler, Lesley, “The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty,” *Arizona Journal of International and Comparative Law*, (2003): 1-40.

What are the current challenges and successes of the Mine Ban Treaty, Landmine & Cluster Munition Monitor, <http://www.the-monitor.org/en-gb/the-issues/faqs/mine-ban-treaty/what-are-the-current-challenges-and-successes.aspx> (accessed March 2018).

“Yemen: Houthi Landmines Claim Civilian Victims,” *Human Rights Watch*, (September 2016), <https://www.hrw.org/news/2016/09/08/yemen-houthi-landmines-claim-civilian-victims>, (accessed February 2018).